No. 20,783

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LANE-COOS-CURRY-DOUGLAS COUNTIES BUILDING AND CONSTRUCTION TRADES COUNCIL, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In our opening brief, we showed: (1) that respondent Union picketed an employer in order to compel inclusion in a bargaining contract of a certain provision, (2) that the disputed provision would allow employees covered by the contract to refuse to cross any picket line "authorized" by the Union and, in addition, would allow the employees to refuse to handle any products declared "unfair" by the Union, and (3) that execution of a contract containing such a

provision would violate Section 8(e) of the Act. Respondent, in its brief, hardly disputes all this.

In its defense, however, respondent now claims that the construction industry proviso to Section 8(e) is applicable here, that the disputed contract provision—admittedly unlawful in other industries—is immunized by that proviso, and that the Union was consequently entitled to picket in order to secure execution of this agreement. The industry proviso referred to states that

> "nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a buliding, structure, or other work".

The Board does not dispute that this case involves "an agreement between a labor organization and an employer in the construction industry". Nor does the Board contend that picketing to secure such an agreement would be unlawful if the proviso immunized this agreement from the reach of Section 8(e). In the Board's view, this agreement does not qualify for exemption under the proviso because it is not an agreement "relating to the contracting or subcontracting of work to be done at the site . . .". It is, rather, an agreement whereby on-site employers consent to engage in a future boycott of any employer disfavored by the Union, regardless of whether the latter employer is engaged in work at the job site.

The legislative history of the construction industry proviso shows that it was designed to allow industry employers and unions to continue their widespread practice of including provisions in their bargaining contracts requiring that all jobsite work be performed by union employers. Such an agreement is clearly a secondary, or hot-cargo, clause: it calls for a boycott of other employers solely because of the latter's non-union status. See authorities cited and discussion at p. 7 of our opening brief. But Congress in 1959 concluded that special legislation was warranted in deference to the industry's special problems,[1] and, in enacting a prohibition against hot cargo contracts, it granted the industry a limited exemption. As Senator John F. Kennedy explained, this was necessary "to avoid serious damage to the pattern of collective bargaining in [this] industry." II Legislative History of the L.M.R.D.A. of 1959 (G.P.O. 1959), p. 1432 (hereinafter cited as "Leg. Hist.").[2]

Accordingly, the function of the proviso was to allow the parties to continue to enter into agreements

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[1] For a general discussion of the distinguishing characteristics of the construction industry, see Note, 60 Yale L.R. 673 (1951).

[2] Independent studies have buttressed this legislative judgment, showing that no other industry relies so heavily upon subcontracting clauses as a means of stabilizing employment standards to the mutual benefit of both employers and employees. Pierson, *Building-Trades Bargaining Plan in Southern California*, 70 Monthly Labor Review 14 (U.S. Dept. of Labor, B.L.S. 1950); Lunden, *Subcontracting Clauses in Major Contracts*, 84 Monthly Labor Review 579 (U.S. Dept. of Labor, B.L.S. 1961).

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to make the job all-union. But, at the same time, Congress clearly indicated that the proviso was not intended to afford construction industry unions a license to boycott suppliers, manufacturers and other employers not engaged at the job site. As the Conference Report stated:

> "It should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site of the construction. The proviso does not exempt from section 8(e) agreements relating to supplies or other products or materials shipped or otherwise transported to and delivered on the site of the construction." I Leg. Hist. 943.

Senator Kennedy, in urging the Senate to adopt the Conferees' position, made the same point:

> "Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e) . . . . [But] it should be particularly noted that the proviso relates only to the 'contracting or subcontracting of work to be done at the site of the construction.' The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite." II Leg. Hist 1433(3)

The contract provision here involved clearly exceeds the limits of the proviso's intended scope of immunity. As already shown, the on-site employees covered by this agreement would be free to refuse to cross any picket line authorized by respondent Union or by

other named labor organizations; likewise, they would be free to refuse to handle any supplies or materials delivered to the jobsite by any employer considered "unfair" by said unions. Accordingly, the clause allows the respondent to arrange for the boycotting of any union-disfavored employer without respect to whether that employer may be engaged in work at the jobsite. Respondent clearly errs, therefore, in invoking the construction industry proviso.

Respondent's misconception of the law is illustrated by its statement (Br. 10) that "the industry proviso of Section 8(e) saves and excepts [the] on-site construction industry from the effect of Section 8(e)." In fact, according to the statutory terms, the proviso saves only certain industry agreements "relating to the contracting or subcontracting of work to be done at the site". This discrepancy is crucial: under respondent's formulation, industry unions and employers could lawfully arrange to boycott any other employer whereas Congress, by the clear language of the proviso and its accompanying legislative history (*supra*, p. 4), allowed such secondary arrangements to operate only against employers engaging in on-site work. As the court stated in *Essex County District Council of Carpenters* v. *N.L.R.B.*, 332 F. 2d 636, 640 (C.A. 3):

> "This limited exemption was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside non-union men on the same project.

> The exemption does not extend to other agreements, such as those relating to subcontracts for supplies and materials to be transported to and delivered on the construction site."

For the same reasons, respondent errs in contending that Article I of the proposed contract effectively narrows the entire agreement so as to bring it within the scope of the proviso. In the Board's view, nothing in Article I prevents Article IX (the unlawful picket line clause) from allowing job site employees to cause a boycott of any other employer, including off-site suppliers and manufacturers.

Article I provides that

> "This Agreement shall apply to and cover all building and construction work performed by the Employer . . . within the jurisdiction of any Union affiliated with the Council and the contracting or subcontracting of work *to be done at the site of the construction* . . ." (emphasis in original)

This language may effectively prevent the terms of the proposed contract, including Article IX, from applying to those employees not engaged in "construction work performed by the Employer . . . within the jurisdiction of any Union affiliated with the Council." Likewise, employees not engaged in work "to be done at the site of the construction" may not be covered by the contract terms. But the vice of Article IX, the picket line clause, is that it sanctions secondary conduct against off-site employers by those employees who *are* covered. Hence, Article IX is not an agreement relating to the contracting or subcontracting

of work to be done at the site; it is an agreement whereby employees engaged in such work are allowed to cause a boycott of any other employer. Accordingly, the clause exceeds the proper bounds of the proviso.

Nor may respondent contend that this off-site boycott aspect of its picket line clause was unintentional. Apart from the fact that Section 8(e) does not require a showing of unlawful motivation (see our opening brief, pp. 10-12), it is clear that respondent did intend Article IX to apply to picket lines at locations other than the signatory employer's jobsite. This, Article IX allows employees to refuse to cross any picket line "authorized by the [signatory] Council; *or any other Building & Construction Trades Council* or authorized by *any Central Labor Council.*" (emphasis added).

The cases cited by respondent do not advance its position. *Teamsters Local 695* v. *N.L.R.B.* —— F. 2d ——, 53 CCH Labor Cases para. 11,217, 62 LRRM 2135 (C.A. D.C.) manifestly supports the Board's position here [3] on the application of Section 8(e) to picket line clauses. The Court also agreed with the Board that the construction industry proviso was no defense in that case. There, however, the proviso was deemed inapplicable because the signatory union represented employees who were deemed not to be engaged in "work to be done at the site". Hence, that

[3] We cited the Board's decision in that case in our opening brief at pp. 8 and 12. The court decision enforcing the Board's order in full issued on May 16, 1966, shortly after our brief was filed herein.

case did not involve the issue here raised; i.e., whether a contract covering employees who *do* work at the site may lawfully provide for the boycott of off-site employers. Nor is there anything in the Court's opinion in that case to suggest that such a contract would qualify for immunity under the proviso. On the contrary, the Court stated that

> ". . . the purpose of the section 8(e) proviso was to alleviate the frictions that may arise when union men work continuously alongside nonunion men on the same construction site . . . Nothing in the legislative history, however, indicates that the purpose . . . was also to avoid friction resulting from work on struck premises, nor are the possibilities of such friction unique to the construction industry." 62 LRRM 2138.

In *Essex County District Council, supra,* 332 F. 2d 636 (C.A. 3), the Court held that a clause allowing construction employees to cease work was privileged by the proviso. But there, the clause was expressly limited to refusals "to work on the job site where such non-union condition exists". 332 F. 2d at 63. Likewise, in *Construction, Production & Maintenance Laborers Union, Local 383* v. *N.L.R.B. (Colson & Stevens)*, 323 F. 2d 422 (C.A. 9), the clause was expressly limited to on-site construction work.[4]

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[4] For the full text of that clause, see the Board's decision in the *Colson & Stevens* case, 137 NLRB 1650, or the Board's brief, p. 4. The Court's opinion does not set forth the clause in full, for there was no disagreement in that case that the clause would be within the proviso's reach. The real issue in *Colson & Stevens* was whether a union could picket to obtain

Muskegon Brick Layers Union No. 5, 152 NLRB No. 38, also cited by respondent (Br. 7), involves a completely different issue. The clause in that case required the employer to refrain from doing business on any jobsite where another employer is employing workers at wages lower than those provided for in the union contract. The Board did not deny this hot cargo clause the protection of the industry proviso for any failure to limit its geographical scope.[5]

And in *Los Angeles Bldg. & Const. Trades Council (Fowler-Kenworthy Electric Co.)*, 151 NLRB No. 83, the Board held that a secondary clause in a construction industry agreement was privileged by the proviso. But there, the Board found that the language of the clause as well as other surrounding circumstances precluded viewing it as applying to off-site

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agreement on such a clause or whether hot cargo clauses privileged by the proviso could be entered into only voluntarily. The Board has subsequently adopted the views of this Court on that question. *Northeastern Indiana Bldg. & Const. Trades Council (Centlivre Village Apts.)*, 148 NLRB 93.

[5] In the Board's view, the *Muskegon* clause exceeded the intended area of proviso immunity because it provided for strikes in the event of an employer breach and was not limited to judicial contract-enforcement methods. In *N.L.R.B.* v. *Local 217, United Ass'n of Journeymen*, —— F. 2d ——, 62 LRRM 2257 (C.A. 1), the Court disagreed with this view and held that a clause remained entitled to the benefits of the proviso even though it sanctioned independent self help by the employees to enforce the promise to boycott. The Court rested its decision on the "narrow distinction between union-induced [i.e., unlawful] and independent self-help". —— F. 2d ——, 62 LRRM 2259. The *Muskegon* case itself is still pending on a petition for enforcement before the Court of Appeals for the Sixth Circuit (No. 16,886).